Supreme Court, U.S.
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No. 94-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH A. THOMPSON
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for Writ of Certiorari from the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit properly hold that the costs incurred in the trial of Joseph A. Thompson are a nondischargeable debt under 11 U.S.C. Sec. 523 (a)(7).

2. Did the United States Court of Appeals for the Fourth Circuit properly hold that there was no abuse of discretion by the Bankruptcy Court in refusing to allow Debtor to reopen his Bankruptcy case to list the debt to the Commonwealth of Virginia for trial costs.

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DECISIONS BELOW

The United States Bankruptcy Court issued its decision in this case which is set out in Appendix A. This decision has been published at 145 B.R.W. 848 (E.D. Virginia, 1992)

The United States District Court for the Eastern District of Virginia issued a memorandum opinion on December 28, 1992 which is set out in Appendix B.

The Court of Appeals for the Fourth Circuit published a decision dated February 1, 1994. This decision has been published at 16 F.3d 576 (4th Cir. 1994).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Court of Appeals for the Fourth Circuit rendered its decision in Thompson v. Commonwealth of Virginia on February 1, 1994. No rehearing was sought.

The Supreme Court of the United States has jurisdiction to review the decision of the Court of Appeals for the Fourth Circuit under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 523(a)(7), Title 11 United States Code Service, is set out in the Appendix (Pet. App. D, at 31a, *infra*).

Section 14.1-177 of the Code of Virginia, is set out in the Appendix (Pet. App. D, at 31a, *infra*).

Section 19.2-366 of the Code of Virginia, is set out in the Appendix (Pet. App. D, at 32a, *infra*).

STATEMENT OF THE CASE

This case involves a personal bankruptcy under Chapter 7 of the Bankruptcy Code where the debtor failed to list a debt to the State of Virginia, such debt arising from the imposition of costs associated with his conviction for a criminal offense. The sentence of the trial court did not include probation and no provision of parole was shown in the record before any of the courts that have issued decisions herein.

Debtor's motion to reopen his bankruptcy case as allowed under the Code was opposed by the Commonwealth of Virginia. The Bankruptcy Court received the Commonwealth's written opposition to Debtor's motion to reopen and Debtor's reply to such opposition, but did not

provide for oral argument on the matter. The Court presented its decision in open Court and ruled that the motion to reopen should be denied because the costs that debtor sought to have discharged in his reopened bankruptcy case were in the nature of a penalty and therefore not dischargeable under Section 523(a)(7) of the Bankruptcy Code. The Court subsequently issued a written decision.

The debtor filed a notice of appeal from the decision of the Bankruptcy Court on August 19, 1992. The United States District Court on December 28, 1992, issued a memorandum opinion holding the Debtor's costs were dischargeable based on Virginia law and ordered that the case be remanded to the Bankruptcy Court for further proceedings. The Commonwealth of Virginia appealed the District Court's decision on

January 27, 1993 to the Fourth Circuit Court of Appeals.

On February 1, 1994, the Court of Appeals for the Fourth Circuit reversed the District Court and held that Debtor's costs were not dischargeable. The Fourth Circuit held, "[W]hile for state law purposes these costs may be considered other than penal, for the purposes of the Bankruptcy Code the costs appear as a 'condition a state criminal court imposes as part of a criminal sentence.'" (Appendix C, 27a)

REASONS FOR ALLOWING THE WRIT

The Court of Appeals for the Fourth Circuit's decision of February 1, 1994, held that the costs of trial assessed against Joseph Thompson were not dischargeable in bankruptcy. The Court held "[W]hile for state law purposes these costs may be considered other than penal, for purposes of the Bankruptcy Code the costs appear as a "condition a state criminal court imposes as part of a criminal sentence. Kelly, 479 U.S. at 50." In Re: Thompson, Appendix C at 27a. In its decision the Court of Appeals misapplies the test enunciated in Kelly and fails to recognize the words and intent of the statutes and caselaw of the Commonwealth of Virginia.

I. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH THE POSITION OF THE UNITED STATES SUPREME COURT THAT THE SOVEREIGNTY OF STATE CRIMINAL JUSTICE SYSTEMS MUST BE RESPECTED

The Bankruptcy Code permits the discharge of all debts that are not specifically excepted from discharge for a debtor such as Joseph Thompson who files a petition with the Bankruptcy Court (11 U.S.C. 727). Section 523(a) of the Bankruptcy Code (11 U.S.C. 523) lists the exceptions to discharge of debts for debtors who have filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code (11 U.S.C. 701 et seq.).

Section 523 states in pertinent part:

Exceptions to discharge.

(a) A discharge under section 727 ... of this title does not discharge

> an individual debtor from any debt --
>
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss ...

The Supreme Court of the United States in Kelly v. Robinson, 479 U.S. 36, 93 L.Ed.2d 216, 107 S.Ct. 353 (1986) examined Section 523(a)(7) of the Bankruptcy Code. The Court initially stated, "Our interpretation of the Code must also reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." The Court in Kelly (at 50) held:

> We hold that Section 523(a)(7) preserves from discharge any condition a state court imposes as a part of a criminal sentence.

The Court in Kelly went on to state (at

51):

> On its face, it [523(a)(7)] creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both "to and for the benefit of a governmental unit," and "not compensation for actual pecuniary loss."

The Fourth Circuit's decision refused to honor Virginia's law that costs are no part of the sentence of the Court nor a penalty. The Fourth Circuit's decision, although recognizing that costs in Virginia are not penal, held for purposes of federal bankruptcy law that costs imposed as the result of a criminal conviction in Virginia are non-dischargeable in bankruptcy. The Fourth Circuit, while recognizing that the costs were not imposed as part of Debtor's probation or parole, held, "The fact that in some instances punishment will be contingent on court costs is sufficient for

definitional purposes, to lift Virginia's requirement that convicted defendants pay court costs into Section 523(a)(7)." Appendix C at 29a.

Joseph Thompson was assessed costs of trial in the Order of the Circuit Court of Alexandria dated September 22, 1988 pursuant to Virginia Code Section 19.2-336. The Code of Virginia is blunt in declaring that costs are not a penalty. Virginia Code Section 14.1-177 states in pertinent part: "The laws of costs shall not be interpreted as penal laws; ..." (See Appendix D) This statutory scheme of costs in Virginia has been in existence for over a century and consistently has been supported by the Virginia courts as meaning exactly what it says. The seminal case construing this statute is Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853)

where the Court stated as to costs of prosecution:

> It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense. Indeed our statute expressly declares that the laws of costs shall not be interpreted as penal laws: ...The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it.

The Anglea decision has been reaffirmed in numerous Virginia cases including Commonwealth v. McCue's Executor, 109 Va. 302 (1909), Kincaid v. Commonwealth, 200 Va. 341 (1958), Wright v. Matthews, 209 Va. 246 (1968), Wicks v. City of Charlottesville, 215 Va. 274 (1974), and Williams v. Commonwealth, 5 Va. App. 514 (1988). In Wicks the Court stated at 279:

> We can perceive no valid reason why, if the defendant is convicted, the costs of such representation should not be treated as any other debt and collected of the convicted defendant at a later date if and when he becomes able to pay.

In Williams the Virginia Court of Appeals addressed the issue of whether defense counsel in final argument to the jury could address the potential liability for costs if the defendant were convicted. The Virginia trial court ruled defense counsel could refer to the potential fine but could not speak about the costs to be assessed if the jury convicted the defendant. The Court of Appeals in Williams held at 521:

> The defendant's liability for court costs is irrelevant in the jury's determination of the defendant's guilt and punishment, and therefore, should not be addressed or alluded to in final argument. "Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense." Anglea's Case, 51 Va. (10 Gratt.) 696, 701 (1853).

The Supreme Court of Virginia in Wright v. Matthews, 208 Va. 246, 248-49 has gone so far as to note that at least one other state has adopted the same method of treating costs of prosecution when it cites an Ohio case, Ex parte Wilson, 183 N.E.2d 625, 89 Ohio L.Abs. 575 (1962) as standing for the same holding as Anglea, i.e., "costs constitute no part of the punishment for a crime." Also in Matthews, conversely, the Supreme Court of Virginia distinguished its law from that of North Dakota in footnote 4 at 249 when it stated, "In Kilmer the court held, contrary to Virginia law, that costs are imposed as part of the penalty for the offense:..." Thus, the Supreme Court of Virginia has recognized that the treatment of costs is not uniform across the states.

The Circuit Court for the City of

Roanoke, Virginia in Workman v. City of Roanoke and the Commonwealth of Virginia, 17 Va. Cir. 410 (1989), considered the identical bankruptcy issues of the case at bar, whether court costs assessed after debtor's criminal conviction were dischargeable in bankruptcy. The Commonwealth, Respondent here, was a party to the Workman decision. Neither of the defendants appealed the decision to the Virginia Supreme Court.

The Court in Workman held that while other jurisdictions may consider court costs as fines or penalties, "In Virginia, however, it is well settled that court costs are neither fines nor penalties." The Court stated:

> The [Virginia] statutes follow the rule of decision that has existed in Virginia for at least 136 years. Our Supreme Court has held, explicitly, that court costs in criminal cases in this state are intended to be

> "compensation for actual pecuniary loss." The non dischargeability provision of the Bankruptcy Code, 11 U.S.C. Sect. 523(a)(7) must be read in conjunction with the law of the "governmental unit" to which the debt allegedly is owed; i.e., the law of Virginia must be applied to the language of the Bankruptcy Code. Under Virginia law, the Commonwealth's argument against discharge must fail.

The Workman decision is based in part on the independent use of the terms "costs" and "penalties" by the Virginia legislature in Virginia code 19.2-341. The Court cited Klarfield v. Salsbury, 233 Va. 277, 284-85, 355 S.E.2d 319 (1987): "When the General Assembly uses two different terms in the same act, it is presumed to mean two different things."

The Workman decision also points out at 413, "Virginia law -- unlike federal law -- makes the taxing of costs mandatory in every criminal case in which the defendant is found guilty." This distinction is also

important with respect to decisions that have held costs are nondischargeable where the court has discretion in assessing the costs, United States v. Cox, 33 B.R. 657 (Bankr. M.D. Ga. 1983). See also In re Garvin, 84 B.R. 292 (Bkrcy. M.D. Fla 1988) There is no Virginia statute that would allow the Fourth Circuit to find that costs in Virginia are properly characterized as a penalty as occurred in Tennessee v. Hollis, 810 F.2d 106 (1987).

The Court of Appeals' argument that Virginia statute and caselaw cannot properly be applied in the bankruptcy sphere since the legislature and courts did not consider bankruptcy issues is misplaced in that the Federal courts considering this issue have consistently applied state statutes and caselaw that developed apart from bankruptcy law. The law of costs in

Virginia and the decisions of the courts in Virginia are consistent in holding that costs are not part of the sentence of the court or a penalty but rather a debt to the Commonwealth.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUIT COURTS OF APPEALS AND STATE COURTS

Previous Court of Appeals decisions that have considered the dischargeability of court costs have focused on the very issue that is the core of the Kelly holding, i.e., were the costs imposed part of the sentence of the criminal court that originally heard the matter, and, if so, were the costs properly denied exception by fulfilling all of the three prongs of the statute.

The Seventh Circuit Court of Appeals

in In re Zarzynski, 771 F.2d 304, 305 (1985), stated that the criminal court of Eau Claire County, Wisconsin imposed a sentence on the defendant, Zarzynski, and "as part of the sentence Zarzynski was ordered to pay the costs of his prosecution." This case, decided prior to Kelly, was decided under the law of Wisconsin, a state in which costs are considered to be penal in nature. The Court of Appeals of Wisconsin in State of Wisconsin v. Grant, 484 N.W.2d 370, 168 Wis.2d 682 (1992) held at 371:

> The defendant contends, and we agree, that costs are taxable against a defendant as part of the sentence (citing Wis. Code Section 373.06).

The Supreme Court of Wisconsin in State of Wisconsin v. Foster, 301 N.W.2d 192, 100 Wis.2d 103 (1981) noted at 195: "[I]t has been recognized that the assessment of costs is in part a penal measure ..."

The Court in Tennessee v. Hollis, 810 F.2d 106 (6th Cir, 1986) was confronted with decisions of the lower courts holding that under Tennessee law the costs imposed were dischargeable in bankruptcy because they were not a penalty. The Court stated (at 108):

> In light of the Supreme Court's decision in Kelly, the issue before us here boils down to whether the state criminal court assessed costs against appellee as part of his criminal sentence. We believe that the answer to that issue is yes.

The Circuit Court in Hollis reversed the District Court by finding an additional Tennessee statute that provided the Court with the basis to find that the costs imposed on the debtor were a penalty. Only because of this second statute on costs in Tennessee was the Circuit Court able to hold the costs nondischargeable. Hollis states at 108:

> We believe that section 40-24-105(b) of the Tennessee Code, which provides that costs "shall not be deemed part of the penalty" in a criminal case, and upon which the district court relied in reaching its decision, is displaced in this instance by the more specific provisions of section 40-21-109.

Thus, the Court in Hollis was able to find that the costs were a penalty imposed as part of the sentence of the trial court only by finding a specific state statute holding costs to be a penalty.

The Court of Appeals for the Fourth Circuit in the instant case has totally misread Hollis when it states (Appendix C at 28a): "As in the instant case, the statute at issue in Hollis stated that costs "shall not be deemed part of the penalty imposed in a criminal case." The Fourth Circuit goes on to state (Appendix C at 29a): "The only difference between Hollis and the instant case is that the

costs were not assessed as part of the defendant's probation." In reality, the Bankruptcy and District Courts in Hollis relied on Tennessee Code Ann. 40-24-105(b) which held costs were not penalties while the Court of Appeals in Hollis found a more specific section of the Tennessee Code that did provide that court costs were penalties. Only by finding the more specific Tennessee code section was the Court of Appeals in Hollis able to declare the costs non-dischargeable. The Fourth Circuit ignores this distinction.

Although Virginia is not the only state to treat court costs in criminal proceedings as non-penal, there are few cases that discuss such costs in the context of bankruptcy. In one such case the Court in Olds v. Forrester, 102 N.W. 419 (Iowa, 1905), considered the

dischargeability of costs assessed in a criminal prosecution. The Supreme Court of Iowa held that a judgment for costs in a criminal proceedings is not a fine imposed as a punishment for the offense. The Court further held that the discharge of costs in bankruptcy is not contrary to public policy as an interference with the course of justice in the criminal prosecution. The Court stated:

> They (costs) are no part of the penalty. They are not assessed against the accused as a punishment, but rather in pursuance of the general policy by which the losing party in a judicial proceedings is required to pay all taxable costs.... That the obligation of such judgment is civil, and not penal, is further recognized in our former holdings that the general power vested in the Governor of the state to pardon public offenses and to remit fines and forfeitures does not extend to the remission of costs accruing in the prosecution of crimes and misdemeanors.

The Supreme Court of Virginia affirmed the same method of treating costs of

prosecution in Wright v. Matthews, 209 va. 246 (1968) by citing an Ohio case, Ex parte Wilson, 89 Ohio Abs 575, 183 N.E.2d 625 (1962). Thus, in Olds, the Iowa Supreme Court indicates that Iowa has the same method of defining costs as Virginia and the same method of allowing the Governor to remit all fines and forfeitures (but not costs). See Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853).

It is well recognized that Congress did not occupy the entire field of bankruptcy law; state laws continue to be respected in this area including the allowance of individual homestead exemption provisions by the individual states. The Supreme Court in Kelly looked to the law of Connecticut in its decision and the Circuit Court decisions in Zarzynski and Tennessee v. Hollis have looked to the law of the

individual states for their decisions. There has never been a suggestion by the courts that uniformity was required or appropriate in the construction of the dischargeability of costs.

The Courts that have construed the application of the exception for a "fine, penalty and forfeiture" under 11 U.S.C. 523(a)(7) have respected the laws of the states in which the costs were assessed. Each of the decisions construing this provision has looked at state law and the application was in keeping with state law. Indeed, the Court in Kelly, 479 U.S. 36, 49 notes that state laws are to be respected in the application of the Bankruptcy Code.

Here, the decision of the Court of Appeals seeks to avoid the application of Virginia law. It essentially follows In re Zarzynski, 771 F.2d 304 (7th Cir. 1985), a

case applying the Wisconsin law of costs. The Wisconsin law of costs has no place in this case. Rather, the Virginia law of costs controls. If the Fourth Circuit Court of Appeals' view were correct, all courts, when confronted with a case in this area, could simply refer to Zarzynski and find that costs were in the "nature of a penalty". A uniform per se rule of non-dischargeability of costs would be possible if this were the case. No court to date has adopted this view because it is simply untenable.

II. THE COURT OF APPEALS WAS INCORRECT IN FINDING THAT THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEBTOR'S MOTION TO REOPEN

The Court of Appeals held that the Bankruptcy Court did not abuse its discretion in denying debtor's motion to

reopen. The Bankruptcy Court clearly held that its reason for denying debtor's motion to reopen was that prosecution costs were nondischargeable:

> Because we conclude for the following reasons that the Commonwealth's prosecution costs are nondischargeable pursuant to Section 523(a)(7), we hold that reopening Debtor's case would not accord relief to the debtor, and no other cause to reopen has been put forth.

The standard for reopening a bankruptcy case to add an additional creditor is stated in In re Candelaria, 121 B.R.140, 142 (E.D.N.Y. 1990):

> [T]he court notes that a desire to amend "a schedule to include an additional creditor and, thus, accurately reflect all debts owed," generally "constitutes sufficient cause to reopen" a no asset bankruptcy case.

The Court went on to state that motions to reopen should be liberally granted unless certain conditions are present, none of which apply here.

The Fourth circuit's holding of non-dischargeability is contrary to the Kelly decision and is no bar to reopening and discharge.

CONCLUSION

For the reasons stated herein, this court should issue a writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the questions raised in this petition.

Dated: May 2, 1994

Respectfully submitted,

Nils G. Peterson

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the Petition for Writ of Certiorari were mailed, postage prepaid to John E. Kloch, Commonwealth's Attorney, 520 King Street, Room 301, Alexandria, VA 22314 on the 2nd day of May, 1994.

Nils G. Peterson

APPENDIX A

In re Joseph A. THOMPSON, Debtor

No. 91-15420

United States Bankruptcy Court,
E.D. Virginia,
Alexandria, Virginia

September 30, 1992.

MEMORANDUM OPINION

Marvin V. B. BOSTETTER, Jr., Chief Judge.

This matter is before the Court on the motion of Joseph A. Thompson (the "Debtor") to reopen his bankruptcy case pursuant to §350(b) of the Bankruptcy Code, 11 U.S.C. §350(b).[1] The Debtor seeks to reopen this case in order to add the Circuit Court of the City of Alexandria to his schedules as a nonpriority, unsecured creditor so that

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[1] All further references to individual section numbers refer to Titles 11 of the United States Code unless otherwise stated.

his obligation to pay the costs of prosecuting him for a felony in 1988 will be discharged. The Commonwealth of Virginia (the "Commonwealth"), through the Commonwealth's attorney for the City of Alexandria, opposes Debtor's motion. For the reasons set forth herein, we deny the Debtor's motion to reopen his bankruptcy case.

The facts are undisputed. On September 22, 1988, Debtor was convicted of a felony in the Circuit Court of the City of Alexandria. Consequently, the Debtor was sentenced to a period of confinement and ordered to pay the costs of prosecution in accordance with section 19.2-336 of the Code of Virginia. Va. Code Ann. §19.2-336 (Michie 1983). On December 13, 1991, the Debtor filed his voluntary petition pursuant to Chapter 7 of the Bankruptcy

Code. He was granted a discharge on March 25, 1992, and his case was closed on April 27, 1992. On March 31, 1992, the CC notified the Debtor of the outstanding costs of prosecution stemming from his conviction. On May 18, 1992, the Debtor filed the pending motion to reopen his case to add the prosection costs to his schedules to have them discharged.

Section 350(b) of the Bankruptcy Code provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." The Debtor contends that he was unaware until after his discharge was granted that the Commonwealth had a prepetition claim for the costs of prosection him. He further asserts that he is entitled to a discharge of his obligation to pay the Commonwealth

the costs or prosecuting him and that, therefore, reopening the case would "accord relief to the debtor" or constitute "other cause" within the meaning of §350(b). The Commonwealth opposes the Debtor's motion on the ground that the obligation to pay the prosecution costs would be nondischargeable according to §523(a)(7) of the Bankruptcy Code and adding the Commonwealth as a creditor would therefore neither "accord relief to the debtor" nor qualify as "other cause" for reopening a case.

Whether "to reopen a case depends upon the circumstances of the individual case and ... the decision whether to reopen is committed to the court's discretion." *Hawkins v. Landmark Fin. Co. (In Re Hawkins)*, 727 F. 2d 324, 326 (4th Cir.1984). Because we conclude for the following reasons that the Commonwealth's

prosecution costs are nondischargeable pursuant to §527(a)(7), we hold that reopening the Debtor's case would not accord relief to the debtor, and no other cause to reopen has been put forth. Thus Debtor's motion to reopen his case is denied.

Pursuant to §523(a)(7), a debtor is not entitled to a discharge of any debt payable to a governmental unit to the extent it is for a "fine, penalty, or forfeiture" that is "not compensation for actual pecuniary loss." In *In re Zarzynsky*, 771 F.2d 304 (7th Cir. 1985), the Court of Appeals for the Seventh Circuit affirmed the bankruptcy court's decision that "the obligation of a debtor to pay the costs of a criminal prosecution is imposed as part of the sentence to punish him for violation of the criminal laws rather than to

compensate [the governmental unit] for actual pecuniary loss[.]" *Id.* at 305. The *Zarzynsky* court further stated that

> [t]here is no ...pecuniary loss when the [governmental unit] functions as it should in the furtherance of its public responsibilities.
>
> Nor does the fact that the costs are based on what the [governmental unit] expended in the trial convert the costs into "compensation for actual pecuniary loss." The costs can be viewed a part of the penalty even though it is a penalty measured by the expenditures for the trial.

Id. at 306

The Seventh Circuit's *Zarzynsky* holding was followed by the Sixth Circuit in *Tennessee v. Hollis (In re Hollis)*, 810 F.2d 106 (6th Cir.1987), wherein the court

reversed the bankruptcy and district courts which had held that costs of prosecution, imposed as a condition of the debtor's criminal probation, were dischargeable. Although the court, interpreting Tennessee law, noted that the assessment of costs "was intended, at least in part, to compensate the State for the expense it had incurred in prosecuting" the debtor, the court held that because the costs imposed were part of the debtor's criminal sentence, such costs were nondischargeable pursuant to §523(a)(7). *Id.* at 108.

Pursuant to section 19.2-336 of the Code of Virginia, a person acquitted of a crime is not assessed the costs of prosecution. Because the prosecution costs are imposes only when a criminal defendant is found guilty, such costs are in the nature of a "fine, penalty, or forfeiture"

contemplated by §523(a)(7) and "not compensation for actual pecuniary loss."

Our conclusion is further supported by *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2nd 216 (1986), in which the United States Supreme Court considered the Bankruptcy Code "in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems, *id.* at 44, 107 S.Ct. at 358, and held that "§523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence." *Id.* at 50, 107 S.Ct. at 361. In the case at bar, the Debtor's payment of the prosecution costs is a condition of fulfilling his criminal sentence.

The Debtor argues that the costs of

prosecution were either not "a fine, penalty, or forfeiture" or were "compensation for actual pecuniary loss" within the meaning of §523(a)(7). In support of his argument, the Debtor cites *Anglea v. Commonwealth*, 51 Va. (10 Gratt.) 696 (1853), in which the court found that the costs of prosecution assessed against a convicted defendant were

> exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws.... Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offence.

Id. at 701. The actual holding of the *Anglea* court was that a pardon releasing the convict from all "pains, penalties or forfeitures" failed to release the convict's obligation to pay the costs of prosecution, because such costs were neither a "pain," "penalty," nor a "forfeiture" within the language of the pardon. *Id.* at 700. The *Anglea* court did not, however, analyze whether costs of prosecution are encompassed within the language of §523(a)(7). The analysis of the *Anglea* court cannot be properly extended from its particularized context involving a pardon to an analysis of what constitutes a nondischargeable "fine, penalty, or forfeiture" within the meaning of the Bankruptcy Code. Construing the language of a pardon to exclude costs of prosecution is not akin to a finding that

costs of prosecution are dischargeable in bankruptcy. *See Hollis*, 810 F.2d at 108 (costs imposed as a condition of the Debtor's probation were nondischargeable pursuant to §523(a)(7) not withstanding a Tennessee statute providing that such costs "shall not be deemed part of the penalty" in a criminal case). If any conclusion can be drawn from the *Anglea* decision, it is that Virginia law is designed to prevent convicted defendants from avoiding their obligation to pay the costs of prosecution. As the Supreme Court noted in *Robinson*, out analysis under §523(a)(7) must be done "in light of the interests of the states in unfettered administration of their criminal justice systems." *Robinson*, 479 U.S. at 44, 107 S.Ct. at 358.

Finally, Debtor argues that the Commonwealth is barred from collecting the

costs of prosecution because it has failed to comply with various Virginia statutory prerequisites. These arguments are best made in defending an action by the Commonwealth to enforce payment.

An Order denying the Debtor's motion to reopen this case has been entered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Joseph A. Thompson

Appellant,

v.

Commonwealth of Virginia

Appellee

Civil Action No. 92-1473-A

MEMORANDUM OPINION

This matter comes before the court on Joseph A. Thompson's appeal from a decision

of the bankruptcy court denying his motion to reopen his case under section 350(b) of the Bankruptcy Code so that unpaid costs arising under a criminal conviction assessed against him under section 19.2-348 of the Code of Virginia could be discharged. The bankruptcy court denied appellant's motion to reopen his case on the grounds that costs arising from a criminal conviction are nondischargeable debts under section 523(a)(7) of the Bankruptcy Code.

The legal decisions of the bankruptcy court are subject to a de novo review in this court. In re Bloomington H H Investors Limited, 23 C.B.C.2d 633 (Bankr. D. Minn. 1990). The bankruptcy court's refusal to reopen appellant's case is subject to an abuse of discretion standard of review. Hawkins v. Landmark Fin. Co.

(In Re Hawkins), 727 F.2d 324, 326 (4th Cir. 1984). As a matter of law the costs from appellant's criminal conviction are dischargeable because they do not constitute penalties under Virginia law.

The Bankruptcy Code provides an exception to discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. §523(a)(7). This section of the Bankruptcy Code is to be applied to debts arising from governmental units by examining the governmental unit's classification of the debt. Williams v. Motley, 925 F.2d 741 (4th Cir. 1991) (Service fee imposed under section 46.2-370 of the Virginia Code to "partially defray the cost of administration" incurred by the

Virginia Department of Motor Vehicles though in the nature of a penalty is not excluded from discharge by section 523(a)(7) of the Bankruptcy Code because the debt constitutes "compensation for actual pecuniary loss.")

The bankruptcy court applied case law holding that the assessment of costs arising from criminal convictions were nondischargeable debts in bankruptcy. Because the cases upon which the bankruptcy court relied are premised on statutes and case law of states that classify such costs as penalties, they are inapplicable to the assessment of costs in Virginia. In Re Zarzynsky, 771 F.2d 304 (7th Cir. 1985) (Discharge denied for court costs classified as penalties under Wisconsin law); Tennessee v. Hollis, 810 F.2d 106 (6th Cir. 1987) (Discharge denied for court

costs classified as penalties under Tennessee law).

In contrast, the Virginia code explicitly states that "[t]he laws of costs shall not be interpreted as penal laws." Va. Code Ann. §14.1-177. This has been the rule regarding costs in Virginia since at least 1853 when the Virginia Supreme Court held that a governor's pardon of a criminal conviction did not vacate a judgment assessing the costs of prosecution because such costs were not a part of the criminal penalty itself. Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853). The assessment of costs relating to a criminal conviction is not a penalty and therefore §523(a)(7) of the Bankruptcy Code is no bar to a discharge of that debt.

The bankruptcy court's denial of appellant's motion to reopen his case was

based upon the court's incorrect determination that the debt appellant sought to include in his estate was nondischargeable. The bankruptcy court thus abused its discretion in denying appellant's motion to reopen his case. In re Candelaria, 22 C.B.C.2d 465 (B.Ct., E.D.N.Y. 1990).

An appropriate order shall issue.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: JOSEPH A. THOMPSON,
Debtor.

JOSEPH A. THOMPSON,
Plaintiff-Appellee,

v.

COMMONWEALTH OF VIRGINIA,
Defendant-Appellant.

No. 93-1146

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-92-1473-A, BK-91-15420-AB)

Argued: October 27, 1993

Decided: February 1, 1994

Before MURNAGHAN, Circuit Judge, CHAPMAN, Senior Circuit Judge, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Reversed by published opinion. Judge Murnaghan wrote the opinion, in which Senior Judge Chapman and Senior Judge Young joined.

COUNSEL

ARGUED: John Minh Tran, Assistant Commonwealth's Attorney, Alexandria, Virginia, for Appellant. Nils George Peterson, Jr., Arling-

ton, Virginia, for Appellee. **ON BRIEF:** John E. Kloch, Commonwealth's Attorney, Alexandria, Virginia, for Appellant.

OPINION

MURNAGHAN, Circuit Judge:

On September 22, 1988, the Debtor, Joseph A. Thompson, was convicted of a felony in the Circuit Court for the City of Alexandria. The Circuit Court sentenced the Debtor to confinement in the state penitentiary for a period of five years and further ordered the Debtor to pay the costs of prosecution. On December 13, 1991, the Debtor filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code. The debtor was granted a discharge from his debts on March 25, 1992.

Subsequent to receiving his discharge, the Debtor filed a motion to reopen his estate to add unpaid court costs arising from his 1988 state criminal conviction as a debt to be discharged. On the ground that such a debt was non-dischargeable under the Bankruptcy Code, the Bankruptcy Court refused to reopen the case.

On December 28, 1992 the United States District Court for the Eastern District of Virginia, Alexandria Division, reversed the decision of the Bankruptcy Court. The District Court issued a written memorandum wherein it held that the Debtor's court costs were dischargeable in bankruptcy, and that it was an abuse of discretion for the Bankruptcy Court not to permit the Debtor to reopen his case. The District Court issued an Order remanding the case to the Bankruptcy Court for proceedings consistent with its rulings.

The case never returned to Bankruptcy Court, but instead was appealed to the Fourth Circuit. The Commonwealth of Virginia seeks a reversal of the District Court's ruling, and a holding that costs arising out of a criminal conviction are not dischargeable in bankruptcy.[1]

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[1]Ordinarily, a district court's remand to the bankruptcy court is not an appealable order, however, the case is properly before us since the only act left for the bankruptcy judge was ministerial.

The facts of this case are undisputed. Subsequent to receiving his discharge in Bankruptcy, the Debtor had realized that he remained liable for the unpaid court costs arising from his criminal conviction in 1988 and filed a motion to reopen his estate to include such court costs as a debt to be discharged. The Bankruptcy Court denied the Debtor's motion to reopen his case, on the ground that court costs are not dischargeable in bankruptcy. The District Court reversed and remanded, holding that such costs were dischargeable and that the Bankruptcy Court's decision not to reopen the case was an abuse of discretion.

DISCUSSION

11 U.S.C. § 523(a)(7) provides that a discharge under section 727 does not discharge a debtor from any debt to the extent that debt:

(1) is for a fine, penalty or forfeiture;

(2) payable to and for the benefit of a governmental unit; and

(3) is not compensation for actual pecuniary loss.

The parties agree, as they must, that before a debt is considered non-dischargeable under this section, the debt must meet all of the three requirements under § 523(a)(7) enumerated above. The parties disagree, however, as to the applicability of Section 523(a)(7) to court costs arising from a criminal conviction.

The debt that is the subject of the instant appeal is payable to the Commonwealth of Virginia, a government unit under the Bankruptcy Code. 11 U.S.C. § 101(27). Pursuant to the laws of Virginia, the Clerk of the Circuit Court, upon the conviction of a criminal defendant, dockets a claim against the defendant for the costs of prosecution. Va. Code. Ann. §§ 19.2-336, 340 (Michie 1990). Collection of the costs of prosecution can also be accomplished through the set-off of any tax refunds due the defendant from the Department of Taxation. Va. Code Ann. § 58.1-525 (Michie 1991).

Thompson contends that, since Virginia's statutory and decisional law repeatedly has defined assessed costs as non-penal, the costs do not meet the federal Bankruptcy Code's definition of non-dischargeable debts. In other words, Thompson asserts that since the costs are not penalties for the purposes of Virginia Commonwealth law, they cannot constitute a claim that is "for a fine, penalty, or forfeiture" under § 523 of the Bankruptcy Code. Moreover, since the costs are assigned to the convicted defendant to *re-pay* the Commonwealth for the costs of its prosecution, the debt composed of the costs is "compensation for actual pecuniary loss" of the Commonwealth, and for that reason also may not be considered non-dischargeable in bankruptcy.

In *Kelly v. Robinson*, 479 U.S. 36 (1986), the Supreme Court considered whether an order to pay restitution arising out of a criminal proceeding created a dischargeable debt. The Court concluded that restitution paid as a condition of probation was not dischargeable under Section 523(a)(7).

The Court grounded its decision in *Kelly* on its view of the relationship between state criminal and federal bankruptcy law. As the Court stated, "Our interpretation of the Code . . . must reflect the basis for this judicial exception, a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings." *Id.* at 47. The Supreme Court continued, observing that "[t]he right to formulate and enforce penal sanction is an important aspect of the sovereignty retained by the States. . . . This Court has emphasized repeatedly '*the fundamental policy against federal interference with state criminal prosecutions.*'" *Id.* (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971)) (emphasis added).

The Supreme Court's analysis led it to conclude that "[Section] 523(a)(7) preserves from discharge any condition that a state court imposes as a part of a criminal sentence." *Id.* at 50.

> On its face, [523(a)(7)] creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures. Congress included two qualifying phrases; the fines must be both "to and for the benefit of a

> governmental unit," and "not compensation for actual pecuniary loss."

Id. at 51.

The Commonwealth concedes that there is a line of Virginia cases defining as non-penal court costs arising from criminal conviction. In addition, Virginia Code Section 14.1-177 provides in pertinent part, "The laws of costs shall not be interpreted as penal laws[.]" Va. Code. Ann. § 14.1-177 (Michie 1993). The statutory scheme of costs in Virginia has been in existence for more than a century, and Virginia courts uniformly have accepted the meaning of the statute as literal. The font of this interpretation is the seminal case of *Anglea v. Commonwealth*, 51 Va. (10 Gratt.) 696 (1853), where the Virginia Supreme Court stated:

> It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth. Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offense. Indeed our statute expressly declares that the laws of costs shall not be interpreted as penal laws .... The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it.

Id. at 701.[2] In various contexts, the *Anglea* decision has been reaffirmed by Virginia cases. *Wicks v. Charlottesville*, 215 Va. 274, 208 S.E.2d 752 (1974); *Kincaid v. Commonwealth*, 200 Va. 341, 105 S.E.2d 846 (1958); *Commonwealth v. McCue's Executor*, 109 Va. 302, 63 S.E. 1066 (1909).[3] By way of example, in *Williams v.*

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[2]Ironically, the result of the *Anglea* holding was that an individual who had been pardoned for his crime was not relieved of the duty to pay his court costs. The result urged by Thompson, in the instant case, would have the opposite effect.

[3]One Virginia Circuit Court recently considered the identical issue raised by the instant appeal. There, the state circuit judge cited the cases

Commonwealth, 5 Va. App. 514, 365 S.E. 2d 340 (1988), the Virginia Court of Appeals considered the issue of whether defense counsel, in final argument to the jury, could address the potential liability for costs if the defendant were convicted. The Virginia trial court ruled defense counsel could refer to the potential fine but could not speak about the costs to be assessed if the jury convicted the defendant. The *Williams* Court held:

> The defendant's liability for court costs is irrelevant in the jury's determination of the defendant's guilt and punishment, and, therefore, should not be addressed or alluded to in final argument. "Payment of costs is no part of the sentence of the court and constitutes no part of the penalty or punishment prescribed for the offense."

Id. at 521 (citing *Anglea*).

Taken at face value, the Virginia statute and subsequent case law strongly suggest that not only are the assessed costs not "penal," but they also serve as "compensation for actual pecuniary loss." The dilemma, therefore, is that Virginia state courts, largely acting in fields outside the bankruptcy context, have created, for Commonwealth of Virginia purposes, a definition of the assessed costs, which, if extended to federal bankruptcy, would allow a convicted criminal to discharge his court costs by declaring bankruptcy. Such a result seems at odds with the Supreme Court's *Kelly* decision, in which it "h[eld] that § 523(a)(7) preserves from discharge any condition a state

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mentioned above and determined that "There is no room for debate or discussion about the state of Virginia law. Court costs imposed in criminal cases in Virginia's state courts are not fines or penalties; they are compensation for actual pecuniary loss. Therefore, discharge of these costs is not barred by 11 U.S.C. § 523(a)(7)." *Workman v. City of Roanoke*, 17 Va. Cir. 410 (1989). As discussed below, however, there *is* at least "room for debate or discussion" about whether or not costs should be dischargeable in bankruptcy. In any case, notwithstanding our respect for the decision of a state court, we cannot allow it to occasion a result at war with federal bankruptcy law.

criminal court imposes as part of a criminal sentence." *Kelly*, 479 U.S. at 50.[4]

While it is true that Virginia cases have held that for certain Commonwealth purposes the costs assessed are not part of the sentence, it is also plainly the case that the costs are only paid by those defendants who are convicted of the crime charged. The "debt" is not incurred absent conviction. As the Commonwealth's brief points out, the Virginia law that has developed with respect to the definition of court costs has done so almost exclusively outside the context of the federal Bankruptcy statutes. A review of some of the cases cited by Thompson shows that those cases which held that court costs were not penal in nature addressed issues completely different from the issue of the dischargeability of a debt in bankruptcy.

In *Anglea v. Commonwealth*, for example, the Supreme Court of Virginia had to decide whether a governor's pardon would also vacate the imposition of court costs. The Court held that a pardon was not the equivalent of a reversal of the prior judgment against the defendant, and that a defendant was no less a felon once pardoned of his offense than he was a felon upon his conviction. The Court held that costs, being separate and apart from the penalties imposed upon the defendant, were not vacated simply upon his pardon, and that once convicted, the defendant remained obligated to pay his costs, regard-

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[4]Subsequent to its *Kelly* decision, the Supreme Court considered the dischargeability of criminal costs restitution payments in a Chapter 13 bankruptcy proceeding. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Noting that a Chapter 13 proceeding had a broader discharge provision than did Chapter 7, the Court held that obligations of restitution could be discharged under Chapter 13. *Id.* at 2132 & 2133. It is clear, however, that *Kelly*, and not *Davenport* controls the case before us. First, like the instant case, *Kelly* concerned discharge in Chapter 7. Second, in 1990, Congress passed the Criminal Victims Protection Act of 1990 which added a paragraph to the discharge provision of Section 1328(a) and created an exception from discharge, in Chapter 13 proceedings, for criminal restitution payments. 11 U.S.C. § 1328(a)(3). In so doing, Congress not only indicated its dissatisfaction with the *Davenport* decision, but also once again reaffirmed its commitment to *Kelly's* holding that federal bankruptcy law should not provide a haven for those convicted under the criminal law.

less of any pardons which he might later receive. *Anglea*, 51 Va. (10 Gratt.) at 702.

In *Commonwealth v. McCue's Executor*, 109 Va. 302, 63 S.E. 1066 (1909), the Supreme Court of Virginia, citing *Anglea* for its proposition that recovery of court costs was a matter of revenue, held that the authority to collect costs on behalf of the Commonwealth rests solely with the Commissioner of Revenue and not the Commonwealth's Attorney.[5]

In *Kincaid v. Commonwealth*, 200 Va. 341, 105 S.E.2d 846 (1958), the Virginia Supreme Court decided that although a defendant had the right to a jury trial, the imposition of costs to pay for the exercise of that right did not violate the constitutional rights of the defendant. The right of Virginia to recover the costs of prosecution from the defendant without violating the Constitution was also affirmed in *Wicks v. Charlottesville*, 215 Va. 274, 208 S.E.2d 752 (1974).

In none of the Virginia cases cited were the courts confronted with the task outlined in *Kelly* of balancing Congress' desire to afford relief to over-extended debtors, and the state's interest in prosecuting its criminal laws. Indeed, the latter is an interest that the framers of the Bankruptcy Code do seem to have shared. "[T]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension." H.Rep. No. 595, 95th Cong., 1st sess. 342, *reprinted in* 1978 U.S. Code Cong & Admin. News 5787, 5837 (legislative history to automatic stay provision).

Even if the costs associated with conviction can be considered penal for the purposes of § 532(a)(7), however, there is still the difficult question of whether or not the costs assessed against Thompson have been charged solely to recoup the cost of prosecution to the Commonwealth. In other words, are the costs, even if penal still "compensation for pecuniary loss?" If they are, then they are dischargeable under the Bankruptcy Code.

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[5]The *McCue* decision subsequently has been overruled by the Virginia legislature, which now allows the Commonwealth's Attorney to institute collection proceedings.

Even though repayment is unarguably one reason for assessing such costs, in operation, the manner in which the costs may be paid suggests that they should be understood more broadly than simply as repayment to the State.

The court costs owed to the Commonwealth under a criminal case bear little resemblance to what normally constitute costs or recovery for pecuniary loss in a civil case. Section 19.2-354(B) of the Virginia Code allows the trial court to establish a program which would allow those who are unable to pay their fines and costs to satisfy their obligation through the performance of community service. Va. Code Ann. § 19.2-354(B) (Michie 1990). Section 19.2-356 authorizes the court to place *as a condition of probation*, the payment of costs, and authorizes the court to require the defendant to be of uniform good behavior if payment of the fines and costs are deferred or made a condition of probation. Va. Code. Ann. § 19.2-356 (Michie 1990). All those terms and conditions suggest that the assessment of costs is understood by the Commonwealth as operating hand-in-hand with the penal and sentencing goals of the criminal justice system. The practical operation of the cost-assessment can only be understood in the penal context. Consequently, while for state law purposes these costs may be considered other than penal, for the purposes of the Bankruptcy Code the costs appear as a "condition a state criminal court imposes as part of a criminal sentence." *Kelly*, 479 U.S. at 50. The *Kelly* decision thus mandates that for purposes of federal bankruptcy law, costs imposed as the result of criminal conviction are non-dischargeable in bankruptcy.

Two other federal circuit courts have held that costs arising out of a criminal conviction are not dischargeable in bankruptcy. In *In re Zarzynski*, 771 F.2d 304 (7th Cir. 1985), the Seventh Circuit considered a case concerning Wisconsin law. Like Virginia, Wisconsin had a statute that provided for the payment of the costs of prosecution by convicted defendants. The *Zarzynski* panel offered a pragmatic approach to the question presented:

> In our view what a county expends in a criminal prosecution in the fulfillment of its statutory police power responsibilities is not "an actual pecuniary loss" to the county. It is, of course, an expenditure by the government, part of the

> expense of governing, but the county did not undertake the expense expecting to create a debtor creditor relationship. In this case, the county did its duty to protect the public by convicting and punishing a law violator. There is no county pecuniary loss when the county functions as it should in the furtherance of its public responsibilities.

Id. at 306. The Seventh Circuit continued saying that, "[t]he costs can be viewed a part of the penalty even though it is a penalty measured by the extent of certain county expenditures for trial. . . . '[B]ankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy.'" *Id.* (citation omitted).[6]

The Sixth Circuit in *In re Hollis*, 810 F.2d 106 (6th Cir. 1987), reversed the bankruptcy and district courts which had ruled that under Tennessee law costs could not be considered a part of the penalty, and were instead intended as compensation for pecuniary loss. *Id.* at 107. The Sixth Circuit concluded that the case was controlled by *Kelly*, decided in the same year, and reversed. *Id.* at 109 ("unequivocal holding in *Kelly* requires us to find that the criminal court's assessment of costs against appellee does not constitute a dischargeable debt").

As in the instant case, the statute at issue in *Hollis* stated that costs "shall not be deemed part of the penalty imposed in a criminal case." Tenn. Code Ann. § 40-24-105(b) (1982). Following *Kelly*, the *Hollis* Court noted that to be non-dischargeable under the provisions of § 523(a)(7) a debt must satisfy three requirements: 1) it must be for a fine, penalty, or forfeiture; 2) it must be payable to and for the benefit of a governmental unit; and 3) it must not be compensation for actual pecuniary loss. *Id.* at 108. As in the instant case, the *Hollis* Court determined that the issue was "whether [the debt] is a penal sanction or rather a pecuniary measure designed to compensate the State for the expense it had incurred in prosecuting the criminal action against appellee." *Id.*

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[6]It should be noted that *Zarzynski* was decided before *Kelly*, so the Seventh Circuit did not have the benefit of the Supreme Court's discussion when it reached its decision.

Finding that the costs were assessed against the *Hollis* defendant as a condition of his probation, the Sixth Circuit had little difficulty in determining that the debt was a part of the penalty for the purposes of *Kelly*. The Court concluded that the Tennessee Code's provision stating that costs "shall not be deemed part of the penalty" was "displaced in this instance by the more specific provisions of [the section allowing costs to be assessed as part of probation]." *Id.*

The only difference between *Hollis* and the instant case is that here the costs were not assessed as part of the defendant's probation. *See also In re Garvin*, 84 Bankr. 824 (Bankr. M.D. Fla. 1988) (costs not dischargeable where probation was contingent upon payment of those costs). Indeed, the defendant was sent to jail. However, as mentioned above, Virginia does allow costs to be assessed as a condition of probation.

Even though Thompson's release or parole is not, on the facts of the case, contingent on the payment of the costs, Virginia's statutory scheme does, nevertheless, allow probation to be contingent on the payment of court costs. Since this Court is faced with a definitional determination of these costs for the purposes of federal law, that meaning, a general, statutory term, should not change with the specific circumstances of a given case. The fact that in some instances punishment will be contingent on court costs is sufficient, for definitional purposes, to lift Virginia's requirement that convicted defendants pay court costs into § 523(a)(7).[7]

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[7]Research yields only two instances in which costs were determined to have been dischargeable in bankruptcy. *See In re Tapper*, 123 Bankr. 594 (Bankr. N.D. Ill. 1991). In *Tapper*, the bankruptcy judge determined that under Illinois law, the court costs assessed in a consumer action brought by the attorney general could not be considered penal, but were required to make the prosecuting party "whole again."

The critical difference between *Tapper* and the instant case, however, is that the costs in *Tapper* arose out of a *civil* proceeding. The *Tapper* court noted that "cases barring dischargeability under § 523(a)(7) generally involve criminal or tax-related penalties, and 'not anything analogous to the award of costs in a civil proceeding.'" *Id.* at 605.

Thompson relies heavily on a case decided by an Iowa state court in 1905. *See Olds v. Forrester*, 102 N.W. 419 (Iowa, 1905). In *Forrester*,

Such a result has the added benefit of being consistent with the spirit of the Supreme Court's decision in *Kelly*. The *Kelly* Court was quite clear in holding that "*any* condition a state criminal court imposes as part of a criminal sentence" is not dischargeable in bankruptcy. *Kelly*, 479 U.S. at 50. Since the Virginia Code contemplates parole that is contingent on the payment of costs and it is only the defendant who is convicted that must pay those costs, we find that for the purposes of federal bankruptcy law, the assessment is "part" of the sentence.

CONCLUSION

Having determined that Thompson's court costs are non-dischargeable, we must find that the District Court erred in determining that the Bankruptcy Court abused its discretion. The Fourth Circuit has determined that the issue of whether to permit a Debtor to reopen a case is a matter that rests upon the sound discretion of the court below, depending upon the circumstances of the case. *Hawkins v. Landmark Finance Co.*, 727 F.2d 324, 326 (4th Cir. 1984). Since the debt is non-dischargeable, there was no reason for the Bankruptcy Court to reopen the proceedings to determine whether or not the debt should be discharged.

The judgment of the district court is, accordingly,

REVERSED.

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the Iowa Supreme Court did hold that a judgment for costs in a criminal proceeding is dischargeable in bankruptcy. Apparently, the Iowa court contradicted the policies enunciated eighty years later by the United States Supreme Court in *Kelly*. Of course, the Supremacy Clause further compromises the precedential effect of the Iowa Court's decision.

APPENDIX D

APPLICABLE STATUTORY PROVISIONS

11 U.S.C. 523(a)(7)

Exceptions to Discharge

(a) A discharge under section 727, 1141, or 1328(b) of this title [11 USCS §727, 1141, or 1328(b)] does not discharge an individual debtor from any debt--

...

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty...

Code of Virginia §14.1-177

Laws of costs not penal; discretion of courts of equity. -- The laws of costs shall not be interpreted as penal laws; nor

shall anything in this chapter take away or abridge the discretion of a court of equity over the subject of costs, except as provided in §14.1 - 181.

Code of Virginia §19.2-336

Clerk to make up statement of whole cost, and issue execution therefor. -- In every criminal case the clerk of the circuit court in which the accused is found guilty,or, if the conviction be before a court not of record, the clerk to which the judge thereof certifies as aforesaid, shall, as soon as may be, make up a statement of all the expenses incident to the prosecution, including such as are certified under §19.2-335, and execution for the amount of such expenses shall be issued and proceeded with; and Chapter 21 (§19.2-339 et seq.) of this title shall

apply thereto in like manner as if, on the day of completing the statement, there was a judgment in such court in favor of the Commonwealth against the accused for such amount as a fine; provided, however, that in any case in which an accused waives trial by jury, at least ten days before trial, but the Commonwealth or the court trying the case refuses to so waive, then the cost of the jury shall not be included in such statement or judgment. (Code 1950, §19.1-320; 1960, c. 366; 1970, c. 429; 1975, c. 495; 1978, c. 716)

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

Number 93-1739

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOSEPH A THOMPSON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATUTES

11 U.S.C. § 523(a)(7) (1978)

The statute is set forth in the Appendix to the Petition for Writ of Certiorari.

Va. Code Ann. § 19.2-336 (Michie 1990)

The statute is set forth in the Appendix to the Petition for Writ of Certiorari.

Va. Code Ann. § 19.2-356 (Michie 1990)

Payment of fine or costs as condition of probation or suspension of sentence. -- If a defendant is placed on probation, or imposition or execution of sentence is suspended, or both, the court may make payment of any fine, or costs, or fine and costs, either on a certain date or on an installment basis, a condition of probation or suspension of sentence.

STATEMENT OF THE CASE

On September 22, 1988, Joseph A. Thompson was convicted of a felony in the Circuit Court for the City of Alexandria. The Circuit Court sentenced Thompson to confinement in the state penitentiary for a period of five (5) years and further ordered him to pay the costs of prosecution. On December 13, 1991, Thompson filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code. Thompson was granted a discharge from his debts on March 25, 1992.

Subsequent to receiving his discharge in bankruptcy, Thompson filed a motion to reopen his estate to add unpaid court costs arising from his 1988 criminal conviction as a debt to be discharged. On June 22, 1992, the Commonwealth filed an opposition to this motion. On September 30, 1992, the Bankruptcy Court issued a Memorandum in which it set forth its reasons for denying the motion.

Thompson filed his notice of appeal from the Bankruptcy Court's decision on August 19, 1992. On December 28, 1992, the United States District Court for the Eastern District of Virginia, Alexandria Division, reversed the decision of the Bankruptcy Court. The District Court issued a Memorandum wherein it held that Thompson's court costs were dischargeable in bankruptcy and that the Bankruptcy Court abused its discretion in denying Thompson's motion to reopen his case. The District Court issued an Order remanding the case to the Bankruptcy Court for proceedings consistent with its rulings. On January 27, 1993, the Commonwealth filed its notice of appeal.

On February 1, 1994, the United States Court of

Appeals for the Fourth Circuit reversed the District Court. The Court of Appeals issued an Opinion wherein it held that court costs imposed by a Virginia court as part of a criminal sentence are nondischargeable and that the District Court erred in determining that the Bankruptcy Court abused its discretion in denying Thompson's motion to reopen his case.

REASONS FOR DENYING THE WRIT

The Petition for a Writ of Certiorari should be denied for the following reasons:

(1) The holding of the Court of Appeals for the Fourth Circuit is consistent with the applicable decision of this Court, *Kelly v. Robinson*, 479 U.S. 36 (1986). The *Kelly* Court held that "any condition a state criminal court imposes as part of a criminal sentence" is nondischargeable in Chapter 7 bankruptcy. In considering the context in which Virginia imposes court costs, the Fourth Circuit found that costs are only imposed upon a defendant who is convicted and further; that court costs may be imposed as a condition of probation. Based upon these findings, the Fourth Circuit correctly held that court costs arising from a criminal conviction are nondischargeable under Chapter 7 of the Bankruptcy Code.

(2) The holding of the Fourth Circuit is in accordance with the holdings of the two other United States Courts of Appeals which have considered the same issue.

(3) The decision of the Fourth Circuit does not conflict with the decisions of the Supreme Court of Virginia. The Supreme Court of Virginia has never considered the issue of court costs within the context of federal bankruptcy law.

I. THE HOLDING OF THE COURT OF APPEALS IS CONSISTENT WITH THE RULE OF *KELLY V. ROBINSON*.

The Court of Appeals for the Fourth circuit held that the court costs assessed against Thompson as an incident of his state criminal conviction were not dischargeable in a Chapter 7 bankruptcy. The Court of Appeals based its decision upon an analysis of 11 U.S.C. § 523(a)(7), Virginia Code §§ 19.2-336 *et seq.* and Virginia Code § 19.2-356. The court's analysis conforms to the rule enunciated in *Kelly v. Robinson*, 479 U.S. 36 (1986).

In *Kelly*, the Court considered whether restitution payments imposed upon a Connecticut debtor as a condition of probation were dischargeable in Chapter 7 bankruptcy. The Court held that § 523(a)(7) of the Bankruptcy Code preserves from discharge "any condition a state criminal court imposes as part of a criminal sentence." *Kelly*, 479 U.S. 36, 50 (1986).

A Connecticut statute authorized imposition of restitution as a condition of probation. However, the debtor argued that restitution was compensation for the victim's loss and therefore not preserved from discharge under § 523 (a)(7).

For purposes of § 523(a)(7), the Court considered restitution "in the context in which it is imposed," namely, to

advance the penal goals of the State. The Court concluded that restitution orders imposed as part of criminal proceedings further the State's goals of rehabilitation and punishment rather than the victim's interest in reimbursement. The penal interests of the State were sufficient to place restitution orders within the meaning of § 523(a)(7).

In the instant case, the Code of Virginia authorizes a trial court to impose court costs as a condition of probation. Va. Code Ann. § 19.2-356 (Michie 1990). Although Thompson's court costs were not imposed as a condition of probation, the Commonwealth submits that the definitional determination of these costs for the purposes of federal law should not change with the specifics of a given case.

Pursuant to the Virginia Code, only a defendant who is convicted must pay court costs. Va. Code Ann. § 19.2-336 (Michie 1990). Given the punitive context in which Virginia imposes court costs, the Court of Appeals concluded that court costs are a "condition a state criminal court imposes as part of a criminal sentence."

The Commonwealth submits that the rationale and holding of the Court of Appeals conforms to the analytical framework promulgated in *Kelly*. Therefore, its decision should not be disturbed on appeal.

II. THE HOLDING OF THE FOURTH CIRCUIT IS IN ACCORDANCE WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND DOES NOT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF VIRGINIA.

Two other federal circuit courts have held that costs arising out of a criminal conviction are not dischargeable in bankruptcy.

In *In re Hollis*, 810 F.2d 106 (CA6 1987), the Sixth Circuit held that costs, including court costs, imposed as a condition of probation are not dischargeable in Chapter 7 bankruptcy.

In *In re Zarzynski*, 771 F.2d 304 (CA7 1985), the Seventh Circuit concluded that court costs imposed as part of a criminal sentence are not dischargeable in Chapter 7 bankruptcy.

The Commonwealth submits that there is no conflict between the decision of the Fourth Circuit in this case and the decisions of the Sixth and Seventh Circuits.

The Supreme Court of Virginia has not interpreted the federal Bankruptcy Code as applied to costs arising from a state criminal conviction. Therefore, the cases relied upon by Thompson are not relevant to the decision of the Fourth Circuit.

In *Anglea v. Commonwealth*, 51 Va. (10 Gratt.) 696 (1853), the Supreme Court of Virginia held that a governor's pardon did not relieve a felon of the obligation to pay court costs.

In *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968), the Supreme Court of Virginia held that the petitioner's imprisonment for nonpayment of costs assessed as part of his criminal conviction constituted involuntary servitude in violation of the Thirteenth Amendment to the Constitution of the United States.

In its Opinion, the Court of Appeals considered two

additional decisions by the Supreme Court of Virginia, *Commonwealth v. McCue's Executor*, 109 Va. 302, 63 S.E. 1066 (1909) and *Kincaid v. Commonwealth*, 200 Va. 341, 105 S.E.2d 846 (1958). The court observed,

"In none of the Virginia cases cited were the courts confronted with the task outlined in *Kelly* of balancing Congress' desire to afford relief to over-extended debtors, and the state's interest in prosecuting its criminal laws." *In re Thompson*, 16 F.3d 576, 579 (CA4 1994).

The Supreme Court of Virginia has never considered whether costs arising from a state criminal conviction are dischargeable in Chapter 7 bankruptcy. The Commonwealth therefore submits that there is no conflict between the decisions of the Supreme Court of Virginia and the decision of the Fourth Circuit in this case.

III. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE BANKRUPTCY COURT PROPERLY DENIED THOMPSON'S MOTION TO REOPEN HIS CASE.

In the Fourth Circuit, the issue of whether to permit a Debtor to reopen a case is a matter resting within the sound discretion of the court below. *Hawkins v. Landmark Finance Co.*, 727 F.2d 324, 326 (CA4 1984).

The Bankruptcy Court denied Thompson's Motion to Reopen his case on the grounds that the debt was nondischargeable. The Court of Appeals likewise concluded that the debt at issue was nondischargeable in Chapter 7

bankruptcy. Therefore, the Court of Appeals properly found that the Bankruptcy Court did not commit an abuse of discretion in denying Thompson's Motion to Reopen.

CONCLUSION

The decision of the Fourth Circuit is consistent with the guidelines set forth by this Court in *Kelly v. Robinson*. The decision is consistent with the holdings of the two other Courts of Appeals which have considered the issue. There is no conflict between the federal question decided in this case and any decision of the Supreme Court of Virginia.

For the foregoing reasons, the Commonwealth respectfully requests that the Court deny Thompson's Petition for a Writ of Certiorari.

Respectfully submitted,

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